

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
NIAGARA MOHAWK POWER CORPORATION	)	FCC File No. 0000568432
	)	
Application for Modification of Conventional	)	
Industrial/Business Radio Pool Station WPKW909,	)	
Albany, New York	)	

**ORDER ON RECONSIDERATION**

**Adopted: October 1, 2002**

**Released: October 9, 2002**

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. On January 18, 2002, Niagara Mohawk Power Corporation (Niagara Mohawk) filed a petition for reconsideration<sup>1</sup> contesting the dismissal of its August 22, 2001 application<sup>2</sup> for modification of conventional Industrial/Business Radio Pool Station WPKW909, Albany, New York. For the reasons discussed below, we deny the Petition and affirm the dismissal of the application.

**II. BACKGROUND**

2. Under the Commission's unified policy for dismissing and returning applications, as well as pleadings related to such applications (Unified Policy),<sup>3</sup> applications or pleadings that are defective, as a general matter, are subject to dismissal, rather than being returned to the applicant for correction. As an exception, however, the Commission noted that it retained "the discretion to return an application if circumstances warrant."<sup>4</sup> In the *Unified Policy Public Notice*,<sup>5</sup> the Bureau determined that it would return

<sup>1</sup> Niagara Mohawk Power Corporation Petition for Reconsideration (filed Jan. 18, 2002) (Petition).

<sup>2</sup> FCC File No. 0000568432 (filed Aug. 22, 2001) (Application).

<sup>3</sup> Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Report and Order*, WT Docket 98-20, 13 FCC Rcd 21027 (1998) (*ULS Report and Order*); *see also* Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 11476 (1999) (modifying the Unified Policy).

<sup>4</sup> *ULS Report and Order*, 13 FCC Rcd at 21069 ¶ 92.

<sup>5</sup> *See* Wireless Telecommunications Bureau Revises and Begins Phased Implementation of Its Unified Policy for Reviewing License Applications and Pleadings, *Public Notice*, 14 FCC Rcd 11182 (WTB 1999) (*Unified Policy Public Notice*). On July 1, 1999, the Wireless Telecommunications Bureau (Bureau) began implementing the policy as modified. *See id.* The Unified Policy applies to each Wireless Radio Service six months after the licensing information for that service is implemented in the Bureau's Universal Licensing System (ULS). *See id.* (continued....)

for correction, rather than dismiss, timely filed renewal applications and timely filed notifications of construction (*i.e.*, where dismissal could result in expiration or termination of a license).<sup>6</sup> With respect to returns, the Commission previously has noted that “if the applicant fails to submit an amended application within the period specified in the notification, the application will be subject to dismissal for failure to prosecute.”<sup>7</sup> The Bureau reiterated this notion in the *Unified Policy Public Notice* by stating that:

Returns will be done by letter and will clearly state that failure to respond within 60 days will result in dismissal of the subject application. If at the end of the 60-day period the Bureau is still unable to process the application (whether or not it has been amended), the Bureau may dismiss the application pursuant to Section 1.934(c) for failure to prosecute.<sup>8</sup>

3. On August 22, 2001, Niagara Mohawk filed an application to modify Station WPKW909.<sup>9</sup> Because the application requested frequencies allocated to the Public Safety Radio Pool,<sup>10</sup> Niagara Mohawk requested a waiver of Section 90.20 of the Commission’s Rules.<sup>11</sup> The Licensing and Technical Analysis Branch (Branch) of the Public Safety and Private Wireless Division returned the application to Niagara Mohawk on November 8, 2001.<sup>12</sup> The return letter directed Niagara Mohawk to “provide evidence demonstrating that there are no Industrial/Business pool channels available for this operation.”<sup>13</sup> The letter instructed Niagara Mohawk to respond within sixty days, and warned that failure to respond in that time could result in dismissal of the application.<sup>14</sup> Niagara Mohawk states that its frequency coordinator “attempted to contact the FCC on December 18, 2001, well within the 60-day

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at 11191. In this case, licensing information for the Industrial/Business Pool of the Private Land Mobile Radio Service was implemented in the ULS on December 4, 2000. *See* Wireless Telecommunications Bureau (WTB) Implements Phase III of Three-Phased Deployment of the Universal Licensing System (ULS) for Land Mobile Radio Services on December 4, 2000, *Public Notice*, 15 FCC Rcd 22013 (WTB 2000). As a result, the effective date of the Unified Policy with regard to the Industrial/Business Pool was June 5, 2001. *See id.* The Unified Policy, therefore, applied to the application filed by Niagara Mohawk on August 22, 2001.

<sup>6</sup> *Unified Policy Public Notice*, 14 FCC Rcd at 11182.

<sup>7</sup> *ULS Report and Order*, 13 FCC Rcd at 21069-70 ¶ 93. *See also* Ram Technologies, *Order on Reconsideration*, 16 FCC Rcd 10919 (WTB PSPWD 2001) (*Ram*).

<sup>8</sup> *Unified Policy Public Notice*, 14 FCC Rcd at 11186-87.

<sup>9</sup> At that time, the license for Station WPKW909 was not due to expire until August 22, 2002.

<sup>10</sup> The application specifically requested assignment of the following frequencies: 151.235 MHz, 151.370 MHz, 159.270 MHz, and 159.420 MHz. Pursuant to 47 C.F.R. § 90.20, the referenced frequencies are assigned to the Public Safety Radio Pool. *See* 47 C.F.R. § 90.20(c)(3).

<sup>11</sup> *See* Application, Exhibit 1 (Waiver Request). Absent a waiver, Niagara Mohawk is ineligible to hold an authorization in the Public Safety Radio Pool. *See, e.g.*, 47 C.F.R. § 90.20(a); *see also* Waiver Request at 1.

<sup>12</sup> Automated Return Letter, FCC File No. 0000568432 (dated Nov. 8, 2001).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

deadline,”<sup>15</sup> but Commission staff did not return its call until January 5, 2002, at which time staff referred Niagara Mohawk to another member of the Commission’s staff for more information.<sup>16</sup> According to the Petition, “[t]he frequency coordinator did contact that person and was instructed to provide a frequency search or a letter indicating that no Industrial/Business Service Channels were available. By that time, the 60-day deadline had passed.”<sup>17</sup>

4. Having failed to amend the application with the requested information within sixty days of the date shown on the return letter, Niagara Mohawk on January 18, 2002 filed the Petition seeking reconsideration of the anticipated dismissal of the application. On March 10, 2002, the Branch dismissed the application.<sup>18</sup>

### III. DISCUSSION

5. As an initial matter, we note that Niagara Mohawk’s filing of the Petition on January 18, 2002 was premature. Niagara Mohawk contends that the instant Petition should be deemed timely filed “because it is filed within 30 days of the deadline for responding to the Notice of Application Return.”<sup>19</sup> We disagree. Section 1.106(f) of the Commission’s Rules specifies that a “petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the *final* Commission action . . . .”<sup>20</sup> In this respect, we note that the Branch did not dismiss the application until March 10, 2002 and that the instant Petition explicitly seeks reconsideration of the Branch’s *anticipated* dismissal of that application.<sup>21</sup> Neither the return letter nor Niagara Mohawk’s anticipation that its application would be dismissed constituted a final Commission action. Instead of seeking reconsideration of a future final action, we believe that the more appropriate course of action would have been for Niagara Mohawk to either seek additional time to provide the requested information to the Branch or timely respond to the return letter with an explanation of why in its view the requested information was not necessary for the Branch to act on the application.

6. Notwithstanding the premature filing of the Petition, however, we note that, because the Branch dismissed the application without prejudice, the Commission’s Rules permit the licensee to file another application<sup>22</sup> seeking the same modification.<sup>23</sup> Therefore, in the interest of efficiency, we will herein address the merits of the Petition at this time.<sup>24</sup>

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<sup>15</sup> Petition at 2. December 18, 2001 represented the 40<sup>th</sup> calendar day in the permissible 60-day response window. After that date, the permissible window of time included twelve regular business days, six weekend days, and two federal holidays.

<sup>16</sup> *Id.* at 2.

<sup>17</sup> *Id.* at 3.

<sup>18</sup> Automated Dismissal Letter, FCC File No. 0000568432 (dated Mar. 11, 2002).

<sup>19</sup> Petition at 1 n.2.

<sup>20</sup> 47 C.F.R. § 1.106(f) (emphasis added).

<sup>21</sup> *See* Petition at 1.

<sup>22</sup> *See* 47 C.F.R. § 1.934(c).

7. We reject the Petition's attempt to fault Commission staff for Niagara Mohawk's failure to provide a timely response in this matter. The Commission has continually emphasized that licensees bear the full responsibility for ensuring that they comply with the terms of their licenses and with the Commission's Rules. In so doing, the Commission often reminds applicants, licensees, and other interested parties with business before the Commission that they may not rely on informal discussions with and individual representations by Commission staff. Rather, a strict standard for complying with Commission filing requirements is necessary to ensure that applicants are treated fairly and equally.<sup>25</sup> If we were to accept the Petition's contention that Niagara Mohawk undertook its "best efforts" to respond to the return letter,<sup>26</sup> we are concerned that our action would compromise the integrity of the requirement that applicants respond to requests for additional information within sixty days when the Commission returns an application for the purpose of seeking clarification or additional information.<sup>27</sup> The purpose of that requirement is to ensure timely prosecution and disposition of the application. Niagara Mohawk was given an opportunity to correct its application by responding to the return letter, but Niagara Mohawk failed to take advantage of such opportunity. We therefore find the Petition's stated reason for failing to provide a timely response in this matter to be insufficient to warrant reconsideration of the application dismissal.

#### IV. CONCLUSION

8. For the reasons stated herein, we deny the Petition and affirm the Branch's dismissal of the application filed by Niagara Mohawk on August 22, 2001 for modification of Conventional Industrial/Business Radio Pool Station WPKW909, Albany, New York. The Branch acted properly in dismissing the application after Niagara Mohawk failed to respond to the return letter.

#### V. ORDERING CLAUSES

9. **ACCORDINGLY IT IS ORDERED** that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Niagara Mohawk Power Corporation on January 18, 2002 **IS DENIED**.

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<sup>23</sup> Niagara Mohawk assigned the license for Station WPKW909 to National Grid USA Service Company, Inc. (National Grid USA). See FCC File No. 0000597917 (filed Sept. 24, 2001) (amended application for assignment of authorization); FCC File No. 0000757051 (filed Feb. 1, 2002) (consummation notification). National Grid USA thereafter filed a renewal only application. See FCC File No. 0000910045 (filed June 3, 2002). The renewal only application was granted on June 4, 2002.

<sup>24</sup> See generally Goosetown Enterprises, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 12792 (2001).

<sup>25</sup> See, e.g., *Ram*, 16 FCC Rcd at 10922 ¶ 8; First Auction of Interactive Video and Data Service (IVDS) Licenses, *Memorandum Opinion and Order*, 11 FCC Rcd 1134, 1135 ¶ 7 (1996).

<sup>26</sup> Petition at 4.

<sup>27</sup> See *Ram*, 16 FCC Rcd at 10922 ¶ 8; *IVDS Auction MO&O*, 11 FCC Rcd at 1135 ¶ 7; see also *Unified Policy Public Notice*, 14 FCC Rcd at 11186.

10. This action is taken under designated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry  
Chief, Public Safety and Private Wireless Division  
Wireless Telecommunications Bureau